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DIEBOLD INC. and PREMIER ELECTION  
SOLUTIONS, INC.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ARTIFEX SOFTWARE INC.,

Plaintiff,

v.

DIEBOLD INC., an Ohio corporation, and  
PREMIER ELECTION SOLUTIONS, INC.,  
a Delaware corporation,

Defendants.

Case No. C 08-04837 SC

**REPLY IN SUPPORT OF  
DEFENDANT DIEBOLD INC.'S  
FRCP 12(B)(6) MOTION TO DISMISS  
PLAINTIFF'S CLAIM AGAINST  
DIEBOLD INC.**

Date: April 3, 2009  
Time: 10:00 a.m.  
Courtroom: 1, 17<sup>th</sup> Floor  
Judge: Hon. Samuel Conti

**I. INTRODUCTION**

This Court should dismiss Plaintiff's copyright claim against Defendant Diebold because Plaintiff fails to allege any facts connecting Diebold to the allegedly infringing conduct. A complaint must make minimum factual allegations demonstrating a plaintiff's grounds for relief, yet Artifex's Complaint does not assert *any* facts linking Diebold to the allegedly infringing products. Contrary to Plaintiff's arguments, using "Defendants" in the framing of its Complaint does not relieve it of its obligation to plead factual statements sufficient to allege infringement specifically by *Diebold*. Moreover, the only claims Plaintiff actually alleges against Diebold are

mere recitations of the rights and remedies under the copyright statute, rendering those claims insufficient.

## II. ARGUMENT

### A. Plaintiff Fails To State Any Fact Alleging Direct Infringement By Diebold.

The law, which Plaintiff essentially ignores, requires a minimal level of factual allegations against each defendant. In its Opposition, Plaintiff fails to address any of the cases Diebold cites in its original motion, essentially conceding that such law controls. Plaintiff's only assertion of legal authority is a citation to the general principles of notice pleading (D.I. 28 (Plaintiff's Opposition to Defendant's Motion to Dismiss ("Opposition"), 4:6-9)) and a mischaracterization of the pleading requirements set forth by the Supreme Court in *Bell Atlantic v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007) ("*Twombly*"). D.I. 28 (Opposition, 3:12-18). In *Twombly*, the Supreme Court made clear that, in order to survive a Rule 12(b)(6) motion to dismiss, a plaintiff must assert "*factual* allegations" sufficient to "raise a right to relief above a speculative level." *Id.* at 1965. The Court further stated that "a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 1964-65.

In analyzing the sufficiency of copyright infringement allegations, courts have consistently required certain factually specific allegations. A copyright plaintiff must assert *facts* showing: "(1) ownership of a valid copyright and (2) 'copying' of protectable expression *by the defendant.*" *Religious Tech. Ctr. v. Netcom On-Line Commun. Servs.*, 907 F. Supp. 1361, 1366-67 (N.D. Cal. 1995) (emphasis added) (citing *Baxter v. MCA, Inc.*, 812 F.2d 421, 423 (9th Cir.), cert. denied, 484 U.S. 954 (1987)). A copyright complaint must also assert facts suggesting "by what acts and during what time the *defendant* has infringed the copyright." *Fonovisa, Inc. v. Cherry Auction, Inc.*, 847 F.Supp. 1492, 1495 (E.D. Cal. 1994) (emphasis added) (citing *Klinger v. Weekly World News, Inc.*, 747 F. Supp. 1477 (S.D. Fla. 1990)), *rev'd in part on other grounds*, 76 F.3d 259 (9<sup>th</sup> Cir. 1996). Thus, Artifex is required to make factual allegations of specific acts by Diebold. Artifex has simply failed to do so.

Decisions by other district courts under similar circumstances demonstrate that dismissal

1 of Diebold is proper. In *Broadvision Inc. v. General Electric Co.*, No. 08 Civ.1489 (WHP), 2008  
 2 WL 4684114, at \*2 (S.D.N.Y. Oct. 15, 2008), the district court dismissed copyright claims  
 3 against a parent corporation because the complaint failed to allege *any acts* by which the parent  
 4 *itself* directly infringed the plaintiff's copyright. Similarly, in *Pegasus Imaging Corp. v.*  
 5 *Northrop Grumman Corp.*, No. 8:07-CV-1937-T-27EAJ, 2008 U.S. Dist. LEXIS 43495, at \*5  
 6 (M.D. Fla. May 30, 2008), the district court dismissed claims against defendant parent  
 7 corporation for infringement of the plaintiff's copyrighted document imaging software where the  
 8 plaintiff had alleged no facts showing wrongful conduct on the part of the parent *distinct* from the  
 9 subsidiary's conduct. The court rejected the plaintiff's argument that the use of the term  
 10 "Defendants" sufficiently denoted that both the parent and the subsidiary "directly participated in,  
 11 and are therefore both responsible for, the complained of actions," stating that the plaintiff's  
 12 failure to plead "factual allegations *distinguishing the conduct of the two entities*, is inconsistent  
 13 with the separate identities of corporate entities, including parent and subsidiary corporations."  
 14 *Id.* (emphasis added).

15 As in these cases, Artifex wholly fails to distinguish Diebold's alleged conduct from  
 16 Premier's alleged conduct, and fails to plead any acts by Diebold that could constitute  
 17 infringement. The Complaint specifically alleges that "commercial voting systems" infringed  
 18 Plaintiff's copyrights. D.I. 1 (Complaint ¶18-20). Yet the sole defendant actually alleged to have  
 19 any connection to such "commercial voting systems" is Premier. D.I. 1 (Complaint ¶17). As to  
 20 Diebold, the Complaint only alleges that it is a "multi-national corporation" (D.I. 1 (Complaint  
 21 ¶16)) and is Premier's parent corporation. (D.I. 1 (Complaint ¶17)).<sup>1</sup> Neither allegation is  
 22 sufficient to link Diebold to the allegedly infringing voting systems.

23 Plaintiff tries to mask its deficiencies in its Opposition. First, instead of describing the  
 24 accused products as Premier's "commercial voting systems," as it did in the Complaint (D.I. 1  
 25 (Complaint ¶18-20, 25)), Plaintiff calls the accused voting systems the Defendants' "products" in  
 26

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27 <sup>1</sup> Both facts might have been relevant to an indirect copyright infringement analysis, but  
 28 Plaintiff has conceded that it will not pursue an indirect infringement theory. D.I. 28 (Opposition,  
 5:5-8) The facts of Diebold's corporate nature and structure are irrelevant to any analysis of  
 whether Diebold directly engaged in any infringing actions.

1 an attempt to disguise the issue. D.I. 28 (Opposition, 2:26-28). The only defendant linked to the  
 2 allegedly infringing “commercial voting systems” is Premier. Second, Plaintiff’s focus on the  
 3 Complaint’s use of the plural noun “Defendants” cannot rescue its inadequate factual pleading.  
 4 As stated by the court in the *Pegasus* case, Artifex must make specific factual allegations  
 5 “*distinguishing the conduct of the two entities*” in order to survive a motion to dismiss. *Pegasus*,  
 6 2008 U.S. Dist. LEXIS 43495 at \*5 (emphasis added).

7 Further, the fact that Premier answered the Complaint does nothing to prove the  
 8 sufficiency of the allegations against a different defendant, Diebold. Contrary to Plaintiff’s  
 9 simplistic contention, its Complaint actually contains different alleged facts with respect to each  
 10 defendant. Artifex specifically pleads that Premier “is the manufacturer” of the very voting  
 11 machines it later accuses of infringement. D.I. 1 (Complaint ¶17). Such a factual assertion in  
 12 tandem with Plaintiff’s other allegations may constitute the bare minimum of factual support to  
 13 sustain a copyright claim against *Premier*, however, Plaintiff fails to plead similar factual claims  
 14 regarding *Diebold*. The sufficiency of Artifex’s Complaint must be determined by separately  
 15 examining the factual allegations pled against *each* defendant.

16 Finally, Plaintiff’s argument that it has recited the statutory elements of copyright  
 17 infringement against both “Defendants” is unpersuasive. The Supreme Court cautioned in  
 18 *Twombly* that “a formulaic recitation of the elements of a cause of action will not do.” *Twombly*,  
 19 127 S.Ct. at 1974. These “joint” allegations, on which Plaintiff hangs the bulk of its arguments  
 20 (D.I. 28 (Opposition, 3:3-10)), are merely that – recitations of the rights and remedies under the  
 21 copyright statute. D.I. 1 (Complaint ¶¶25, 26, 27, 28).<sup>2</sup> Such boilerplate allegations are  
 22 insufficient. *See, e.g., Interscope Records v. Rodriguez*, No. 06cv2485-B (NLS), 2007 U.S. Dist.  
 23 LEXIS 60903, \*3-4 (S.D. Cal. Aug. 17, 2007) (applying the holding in *Twombly* and dismissing a  
 24 copyright complaint because it was “simply a boilerplate listing of the elements of copyright

25  
 26 <sup>2</sup> Plaintiff’s allegations of infringing actions by “Defendants” include bald assertions that:  
 27 “Defendants modified, copied, and distributed Ghostscript, or a derivative work thereof”;  
 28 “Defendants intend to continue modifying, copying and distributing” Ghostscript; and such  
 infringement has “affected the potential market” for Ghostscript, and such infringement was  
 “willful.” D.I. 1 (Complaint ¶¶ 25, 26, 27, 28). No other facts are alleged in these claims apart  
 from these conclusory allegations that Defendants infringed Plaintiff’s copyrights.

1 infringement without any facts pertaining specifically to the instant Defendant”); *New Name, Inc.*  
 2 *v. Walt Disney Co.*, No. CV07-5034PA, 2007 U.S. Dist. LEXIS 97855, \*6-7 (C.D. Cal. Dec. 3,  
 3 2007) (applying *Twombly* and dismissing a “formulaic” allegation that “merely mirrors the  
 4 exclusive rights in copyrighted works set forth in the Copyright Act”).

5 Plaintiff has demonstrated that it simply does not have the facts required by Rule 11 to  
 6 allege a claim against Diebold. The sole “fact” that forms the basis for Plaintiff’s entire claim  
 7 against Diebold is that Diebold is Premier’s parent. For the reasons stated above, bald assertions  
 8 of liability against a parent corporation are insufficient to satisfy the pleading requirements set  
 9 forth in the Federal Rules.

10 **B. Plaintiff’s Request For Leave To Amend Should Be Denied.**

11 Plaintiff fails to demonstrate that it has the factual basis under Rule 11 to cure its pleading  
 12 deficiencies against Diebold. “[A] bare request [for leave to amend] in an opposition to a motion  
 13 to dismiss -- without any indication of the particular grounds on which the amendment is sought -  
 14 - does not constitute a motion within the contemplation of Rule 15(a),” and such requests should  
 15 be denied. *U.S. Care, Inc. v. Pioneer Life Ins. Co.*, 244 F. Supp. 2d 1057, 1065 (C.D. Cal. 2002)  
 16 (citing *Confederate Mem. Ass’n, Inc. v. Hines*, 995 F.3d 295, 299 (D.C. Cir. 1993)). Plaintiff  
 17 makes a “bare request” in its Opposition, asserting in a conclusory fashion that “there are  
 18 additional facts regarding Diebold’s infringements.” D.I. 28 (Opposition, 5:24). Artifex goes on  
 19 to assert that it “can and will” allege these unidentified “additional facts,” (D.I. 28 (Opposition,  
 20 5:24-25)) but such an assertion is equally conclusory and equally insufficient. Plaintiff’s single-  
 21 sentence claim to have additional facts fails to give any indication what those facts are. Thus,  
 22 Plaintiff’s request fails to provide any real evidence that it can allege additional facts which  
 23 support a claim for copyright infringement against Diebold. If Artifex had such facts, why didn’t  
 24 it set forth those facts – either in its Complaint or in its Opposition to this motion? Having failed  
 25 to do so, the only logical conclusion is that Plaintiff is actually *unable* to provide any additional  
 26 facts linking Diebold to any acts of infringement.

1     **III.     CONCLUSION**

2             Plaintiff's Complaint is completely devoid of any facts that tie Diebold to any potentially  
3     infringing acts. The law requires that Artifex plead some *facts* demonstrating infringing actions  
4     by Diebold before Diebold can be hailed into court for any alleged wrongdoing. Accordingly,  
5     because Plaintiff fails to allege such facts against Diebold, its claim against Diebold must be  
6     dismissed.

7  
8     Dated: February 20, 2009

Respectfully submitted,

9             JONES DAY

10  
11             By: /S/ Gregory L. Lippetz  
12                 Gregory L. Lippetz

13             Counsel for Defendants  
14             DIEBOLD INC. and PREMIER ELECTION  
15             SOLUTIONS, INC.